FILED
SEP 1 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HARALD SCHLEIFFER, a minor, by next of friend Ann Ker,
Petitioner,

vs

EDWARD J. MEYERS, as Judge of the Whitley Circuit Court, Whitley County, Indiana,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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III
REPLY TO SUMMARY OF AGRUMENT

The respondent in his summary of the argument has misstated the minor citizen appellant's position. We have never contended that when and if the state court holds a "best interest" hearing that it must limit its inquiry to matters of favoring the parent residing in the United States. Our position is simply that such a hearing must be held. After such a hearing, the state court may then decide whether it is in the child's best interest to remain in the United States or to be sent to his mother in Sweden. To date, the state court has made no such determination. The state court judge simply found that the state court had no jurisdiction of the matter and ordered the minor citizen petitioner returned to his mother in Sweden.

The minor citizen petitioner's constitutional position is this: That a citizen of the United States may not be removed from the United States against his will. The operative words are, "against his will". For an adult citizen the determination of "will" presents little or no problem. For a minor citizen (particularly one in a custody dispute) the determination is more difficult. In a custody dispute situation, the court must determine the "will" of the child by determining what is in his best interest. The extent to which the court should give weight to the wishes of the child depends upon the age and maturity of the child. If the state court determines that it is in the best interest of the child to be removed from the United States, then such removal would not be against the child's legal "will".

The state court has not yet adjudicated the crucial matter here in issue.

In fact, it dismissed the case for lack of jurisdiction and ordered the minor citizen petitioner returned to Sweden. Where a vital constitutional right is being violated, any citizen, including a minor citizen, has a right to independent legal counsel. Such constitutional rights are worth far more than the "2¢" referred to in the respondent's brief.

IV
ARGUMENT

A. Reply to Remedy Requested by Petitioner is not Appropriate

The U.S. District Court below in its opinion (A-30 to 31) has indirectly held that if there is a violation of the minor citizen appellant's constitutional rights, then the remedy sought would be appropriate. The U.S. District Court held that the petitioner "has steered the murky waters of the Younger doctrine" and met "the threshold requirements" of the Anti-Injunction Act. It should be noted that the petitioner does

not seek an intrusion by the federal courts into matters traditionally reserved to the state courts. He merely seeks to establish a constitutional standard for the state courts. This position is consistent with In Re Burris, 136 U.S. 586 (1890); In Re Gault, 387 U.S. 1 (1967) and other cases establishing constitutional standards for state courts.

The respondent suggests that the state court "has done nothing more than defer consideration of Harald's 'best interest' to the courts of the Kingdom of Sweden . . . ." However, the state court has done no such thing (A-48 to 56). The state court judge merely dismissed the proceeding for lack of jurisdiction. It made no finding on the "best interest" of the minor citizen petitioner. In fact, there is no evidence in the record which shows that the courts of Sweden have made such a determination. It should be noted that

the Swedish courts entered their custody decree after the minor citizen appellant and his father had already left Sweden. The Swedish judgment was essentially one by default, although the father was still represented in Sweden by a power of attorney. More importantly, the constitutional rights and best interest of an American citizen should be determined by American courts and not by Swedish courts.

B. Reply to Respondent's Merits of Petitioner's Constitutional Claim

1. Reply to Appellant's Brief on Substantive Claims

The issue presented to this court is whether a minor child has a right to a hearing before a state court to determine whether he should be removed against his will from the United States. The minor citizen petitioner believes In Re Gault, 387 U.S. 1, (1967) protects this right.

Quite frankly, your petitioner is puzzled by the use of the case of Parham

vs. J. R., 422 U.S. 384 (1979) by the Seventh Circuit Court of Appeals and by the respondent as authority for denying this constitutional right to the petitioner. While that case did not require a judicial hearing before a child could be institutionalized in a Georgia Mental Hospital by a child's parents, it did require that an inquiry be made by an independent neutral fact finder. That case stands for the principal that a child is entitled to due process protections of his constitutional rights. There are no such protections in the petitioner's case.

2. Reply to Respondent's Brief on Petitioner's Procedural Claim

This court has held for more than a century that a person under the laws of the United States (minor or adult) is more than mere property or "res". The petitioner's constitutional rights are at issue. He has a right to be heard in this cause and has a right to have the state

court make a determination of his rights and "best interest" before determining whether he should be removed from the United States. Whether or not the minor citizen petitioner should be represented in the state court proceeding is a subsidiary question and not crucial to the main constitutional matter here at issue. While petitioner believes that he should be represented independently in the state court action, the main issue is whether or not the court must hold a hearing to determine his "will" or "best interest".

For the purposes of this proceeding, the petitioner has a right to bring this cause and to be represented by counsel. This is supported by the decision of the U.S. District Court below (A-29) for the reason that the child was unable to present the constitutional issues in the state court proceeding. It should be noted that the father's appeal to the

Indiana Court of Appeals was dismissed for lack of prosecution. The father was unable to afford the expense of that appeal and that of paying for his son's appeal to this court. This appeal is now the only route by which the petitioner's constitutional rights can be heard and determined by this court.

C. Reply to Respondent's Reasons for Denial of Petition Pursuant to Supreme Court Rules

The respondent claims that there is no conflict between the decision of the Seventh Circuit Court of Appeals below and the Eighth Circuit Court of Appeals in the case of Bergstrom v. Bergstrom, 823 F.434 (8th Cir. 1980). The Bergstrom case in the District Court, Bergstrom v. Bergstrom, 478 F.Supp. 434 (D.C.N.D. 1979), is very much in point and relied upon by the petitioner in this case. Like this case, it was dismissed in the Court of Appeals. However, the dismissal in the Eighth

Circuit was on the grounds that the case was not yet ripe for determination. The Eighth Circuit did not reverse the constitutional holdings of the District Court. Thus, there is a conflict between the two Circuits. There is certainly a conflict between the District Courts of the two Circuits. Further, this case presents an important constitutional issue which should be resolved by this court.

V
CONCLUSION

It is respectfully prayed that this court grant the Petition for Writ of Certiorari and also stay the state court orders pending this appeal.

Respectfully submitted,

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